No. 757

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CHARLES ELMORE CROPLEY
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Supreme Court of the United States

(OCTOBER TERM, 1945)

WARD MORRISON, JR., AUSTIN HUDSON AND ORIE A. JONES, ET AL.,
Petitioners,
VERSUS
MARYLAND CASUALTY COMPANY,
a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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Dated: Oklahoma City, Oklahoma,
January 15, 1946.

OKLAHOMA TYPOGRAPHICAL CO., 15 S. WALKER, OKLAHOMA CITY, 4, OKLA.

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No.....

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Petitioners,

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MARYLAND CASUALTY COMPANY,
a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Ward Morrison, Jr.; Austin Hudson; North Western National Insurance Company, a corporation; Standard Marine Insurance Company, Ltd., a corporation; Great American Insurance Company, a corporation; Mrs. Artie Caldwell; Mrs. Velma J. Stevens; Charles B. Smith; Nora Smith; Alta L. Davis; Otto D. Donwerth; Alice C. Hair; Bertha Pitzer; Charles Leonard Clary; Myrtle Marie Clary; Draper Park Christian Church; Carl L. Harbin; Minnie L. Harbin; Orie A. Jones; Earl R. Rice; Robert A. O'Connor; John C. Bowlware; L. C. Laxson; James B.

Leverich; John D. Henderson; Earnie D. Webb; and Cynthia Dunn, in their respective individual and corporate capacities and as representative of all other individuals and corporations similarly situated, jointly and severally pray that a Writ of Certiorari issue to review the opinion and decision of the United States Circuit Court of Appeals for the Tenth Circuit entered and filed on November 5, 1945 (Tr. 75-81), Petition for Rehearing (Tr. 83-114) denied December 10, 1945 (Tr. 115), by which the declaratory judgment rendered in favor of petitioners by the District Court for the Western District of Oklahoma, filed April 13, 1945 (Tr. 59, 60), was *Reversed*: and this notwithstanding that respondent admitted and confessed in the district court (Tr. 71) and in the Circuit Court (Tr. 77), of which the Circuit Court took cognizance (Tr. 77) and with which it agreed, that at least a part of the declaratory judgment of the district court was correct and should therefore be *Affirmed*.

By the judgment of the district court it was determined and declared (Tr. 59) that liability and coverage were afforded under respondent's policy in favor of petitioners on account of loss and damage arising by reason of the negligent and hostile firing and subsequent resultant explosion of the insured truck-transport; that Endorsement No. 1 (Tr. 55-56) did not exempt respondent from liability and coverage for loss and damage occurring after the explosion and resulting from the precedent negligent and hostile firing and burning of the insured vehicle because: *First*, under the proximate cause rule such loss and damage was caused by fire (a peril and hazard admittedly covered and insured against) and not by explosion; *Second*, in no

event would the damage and loss sustained following the explosion constitute "*accidents* arising out of explosion" within the proper meaning and construction of the language employed in the exclusion clause.

In *reversing* (Tr. 75) the judgment of the district court, the Circuit Court of Appeals (contrary to applicable State and Federal decisions) held that the proximate cause rule was not applicable; that Endorsement No. 1 exempted respondent from liability and coverage for damage and loss following the explosion, though said explosion was caused by the precedent negligent and hostile fire; and that damage and loss was synonymous with the word "accidents" used in said Endorsement.

JURISDICTION

Jurisdiction of this Court is based on § 240 (a) of the Judicial Code as amended, 8 F. C. A., Title 28, § 347 (a), and on Rule 38, subparagraph 5 (b) of the Revised Rules, as amended, of this Court; jurisdiction of the courts below being based on diversity of citizenship and the existence of the requisite amount in controversy (amount involved being in excess of $25,000.00) as provided by § 24 of the Judicial Code as amended, 7 F. C. A., Title 28, § 41, and on § 274 (d), of the Judicial Code as amended, 7 F. C. A., Title 28, § 400, authorizing declaratory judgments by the Courts of the United States.

SUMMARY STATEMENT

By its declaratory judgment action (Tr. 1-24) respondent asked the district court to declare it was exempted from all liability and coverage under its policy for loss and damage resulting to petitioners following the explosion, solely by reason of the provisions of Endorsement No. 1 attached to said policy which, omitting the formal parts, reads (Tr. 25):

> "It is agreed that such insurance as is afforded by the policy does not apply to *accidents* arising out of explosion of butane gas and other volatile gases."

Respondent's policy is titled "Comprehensive Automobile Liability Policy" (Tr. 7, 24): Note the word *"Comprehensive."* The business of the assured is shown as "Butane Dealer" (Tr. 7) and the purpose of use of the insured truck-transport as "Commercial" (Tr. 13, 15). Except for Endorsement No. 1 above quoted, said policy is a standard form automobile liability policy and contains the usual provisions and obligations as to coverage, defense, settlement of suits and payment of final judgments rendered against assured customarily and universally found in such policies. The principal insuring agreement obligates and binds the respondent (Tr. 9): "To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages * * * sustained by any person or persons, caused by accident and arising out of the ownership, maintenance or use of any automobile." The same obligation is imposed on respondent with respect to damages to

property (Tr. 9). The policy further obligates and binds respondent, for and on behalf of assured (Tr. 9), to "defend in his name and behalf any suit against the assured alleging such injury or destruction and seeking damages on account thereof, *even if such suit is groundless, false or fraudulent.*"

The facts as found and determined by the district court (Tr. 50-54) are undisputed (Tr. 47-50). Those deemed material to a proper determination of the question presented by this petition may be briefly summarized as follows:

On March 31, 1944, and while said insurance contract was in full force and effect, the insured truck-transport was being driven in a northerly direction on South Robinson Street in Oklahoma City (Tr. 52). Said vehicle had been shortly theretofore loaded with butane and propane, highly volatile, inflammable and explosive petroleum products, at a refinery located near Oklahoma City (Tr. 47, 51). When the truck-transport had reached a point in the 4300 block on South Robinson Street, and due to negligence and carelessness of the assureds, Morrison and Hudson (Tr. 52, 53), —and certain others not parties here as joint tortfeasors,— said vehicle was on fire. Said fire was a "*hostile*" fire. The driver left the truck-transport and went to call the Fire Department. While the driver was gone, the truck-transport rolled north and against the street curb "where it continued to burn violently and had already ignited, started burning and had destroyed and damaged, in part at least, the Long-Bell Lumber Company's yard and buildings and a nearby residence, and same had been burning some con-

siderable time before the firemen arrived, and before the explosion hereinafter referred to occurred" (Tr. 52). While the firemen (certain of petitioners here) were attempting to extinguish and control the lumberyard and residential fire, and after they had been so engaged for several minutes and "as a direct and proximate result of the precedent hostile firing and burning of said truck-transport" (Tr. 52), one of the tank containers burst and exploded with great force and violence throwing fire, burning liquids and parts of the burning tank and truck for considerable distances in various directions, "causing death, damage and injury to persons and property in the surrounding area" (Tr. 52). Some of the parties sustained damage, loss and injury from the negligent and hostile fire *before* the resultant explosion. Others, including some of the firemen, sustained bodily injuries consisting, among other things, of *burns*, when the explosion occurred. Still others sustained damage, injury and loss after the explosion occurred from flying particles of the tank and transport (Tr. 53). The "negligent and hostile firing and burning of the truck-transport involved herein" preceded the explosion; and said "resultant explosion was proximately caused by, incidental to and occurred during the course and progress of said precedent, negligent and hostile fire" (Tr. 53).

The Decisions Below

Based on the foregoing facts, the district court rendered its declaratory judgment in favor of petitioners and against respondent, declaring and determining the rights of the parties as heretofore stated. The judgment of the

district court has not been, and will not be, officially published in any report of cases. But the Findings of Fact and Conclusions of Law and the judgment of the district court (duly filed of record April 13, 1945) may be found at pages 50 to 60, inclusive, of the transcript of record of this cause now on file in this Court. The findings and conclusions of the district court are full, clear and complete, the Conclusions of Law being annotated with case citations of authorities amply supporting the judgment of that court. We respectfully suggest that a reading and study thereof will demonstrate to this Court the soundness and correctness of the judgment of the district court in favor of petitioners.

The opinion and decision of the Circuit Court of Appeals *reversing* the judgment of the district court has not yet been officially reported, but may be found at pages 75 to 80, inclusive, of the transcript of record on file herein. It appears upon the face of said opinion and decision that the Circuit Court of Appeals, contrary to the mandate of this Court contained in *Erie Railroad* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 Sup. Ct. Rep. 817, refused to follow and apply the applicable local law on the *doctrine of proximate cause* as announced by the Supreme Court of Oklahoma, — and as announced by the appellate courts of practically every other State, and by the Federal Courts.

Oklahoma Decisions Involved

Springfield Fire & Marine Ins. Co. v. *Oliphant*, 150 Okla. 1, 300 Pac. 711;

Cushing Gasoline Co. v. *Hutchins*, 93 Okla. 13, 219 Pac. 408;

National Life & Accident Ins. Co. v. *May*, 170 Okla. 198, 39 Pac. (2d) 107;

Barnett v. *Merchant's Life Ins. Co.*, 87 Okla. 42, 208 Pac. 271;

Illinois Banker's Life Ass'n v. *Jackson*, 88 Okla. 133, 211 Pac. 508;

Metropolitan Life Ins. Co. v. *Lillard*, 118 Okla. 196, 248 Pac. 841;

General Accident, Fire & Life Assurance Corp. v. *Hymes*, 77 Okla. 20, 185 Pac. 1085;

Great Southern Life Ins. Co. v. *Churchwell*, 91 Okla. 157, 216 Pac. 676.

Federal Decisions Involved

Ætna Insurance Co. v. *Boon*, 95 U. S. 124, 130, 24 L. Ed. 395;

Louisiana Mutual Ins. Co. v. *Tweed*, 7 Wall. 44, 19 L. Ed. 65;

Lanasa Fruit Co. v. *Universal Ins. Co.*, 302 U. S. 556, 82 L. Ed. 422;

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Washburn v. *Farmers' Ins. Co.*, 11 Fed. 304;

Washburn v. *Miami Valley Ins. Co.*, 11 Fed. 633, 639;

Norwich Union Fire Ins. Soc. v. *Board of Comrs.* (C. C. A. 5) 141 Fed. (2d) 600;

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Other State Decisions Involved

Tonkin v. *California Ins. Co. of San Francisco, Inc.*, 62 N. E. (2d) 215;

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Transatlantic Fire Ins. Co. v. *Dorsey*, 56 M. D. 70, 40 Am. Rep. 403;

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Delametter v. *Home Ins. Co.* (Mo.) 126 S. W. (2d) 262;

American Indemnity Co. v. *Halley* (Tex.) 25 S. W. (2d) 911.

Questions Presented

(1) Was the Circuit Court of Appeals justified in holding doctrine of proximate cause was not applicable in determining liability and coverage under respondent's

policy, contrary to decisions of the Supreme Court of Oklahoma, of other Circuit Courts and of this Court, and wholly in disregard of numerous persuasive decisions from the appellate courts of other States?

(2) Was the Circuit Court of Appeals justified in ignoring and wholly disregarding the established rule, as announced by a host of decisions from the Supreme Court of Oklahoma, as respects the construction of insurance policies and clauses purporting to exempt the insurance company from liability and coverage under certain conditions?

(3) Was the Circuit Court of Appeals justified in so construing respondent's policy as to nullify all coverage thereunder while the insured vehicle was loaded with butane, contrary to local law?

(4) Was the Circuit Court of Appeals justified in holding the exclusion clause was not ambiguous?

(5) Was the Circuit Court of Appeals justified in holding and construing loss and damage sustained by some of petitioners following the explosion, as being synonymous with "*accidents* arising out of explosion" within the meaning and import of Endorsement No. 1, thereby giving said exclusion clause a liberal construction in favor of respondent,—instead of a *strict* construction against respondent,—as required by the decisions of the Supreme Court of Oklahoma?

(6) Was the Circuit Court of Appeals justified in reversing outright the declaratory judgment of the district court in favor of petitioners, when respondent has ad-

mitted in both lower courts that a portion of said judgment is correct and should therefore be *affirmed?*

Reasons Relied On for the Allowance of the Writ

(1) The opinion and decision of the Circuit Court of Appeals is in direct conflict with and in disregard of the mandate of this Court in *Erie Railroad* v. *Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, 58 Sup. Ct. Rep. 817.

(2) The opinion and decision of the Circuit Court of Appeals, as respects its refusal to follow and apply the doctrine of proximate cause to the factual situation here, is in direct conflict with and in disregard of the applicable local law as announced by the Supreme Court of Oklahoma in *Springfield Fire & Marine Ins. Co.* v. *Oliphant,* 150 Okla. 1, 300 Pac. 711; *Cushing Gasoline Co.* v. *Hutchins,* 93 Okla. 13, 219 Pac. 408; and is in direct conflict with and in disregard of applicable principles of law as announced by the Federal Courts in *Ætna Insurance Co.* v. *Boon,* 95 U. S. 124, 130, 24 L. Ed. 395; *Louisiana Mutual Ins. Co.* v. *Tweed,* 7 Wall. 44, 19 L. Ed. 65; *Lanasa Fruit Co.* v. *Universal Ins. Co.,* 302 U. S. 556, 82 L. Ed. 422; *Waters* v. *Merchant's Louisville Ins. Co.,* 36 U. S. 210, 224, 9 L. Ed. 691, 697; *Washburn* v. *Farmers' Ins. Co.,* 11 Fed. 304; *Washburn* v. *Miami Valley Ins. Co.,* 11 Fed. 633, 639; *Norwich Union Fire Ins. Soc.* v. *Board of Commrs.* (C. C. A. 5) 141 Fed. (2d) 600; *Maryland Casualty Co.* v. *Scharlack* (C. C. A. 5) 115 Fed. (2d) 719 (Aff. 31 F. Supp. 931); *Ætna Life Ins. Co.* v. *Allen* (C. C. A. 1) 32 Fed. (2d) 490; and is in direct conflict with and in disregard of numerous persuasive decisions of the

appellate courts of other states, particularly a recent decision of the New York Court of Appeals in *Tonkin* v. *California Ins. Co. of San Francisco, Inc.*, 62 N. E. (2d) 215.

(3) The opinion and decision of the Circuit Court of Appeals, as respects the rule that exemption clauses in insurance policies will be strictly construed against the insurance company,—and that insurance policies will be liberally construed in favor of the insured so as to effectuate rather than defeat coverage,—is in direct conflict with and in disregard of the applicable local law as announced by the Supreme Court of Oklahoma in *National Life & Accident Insurance Co.* v. *May*, 170 Okla. 198, 39 Pac. (2d) 107; *Barnett* v. *Merchant's Life Ins. Co.*, 87 Okla. 42, 208 Pac. 271; *Illinois Banker's Life Ass'n* v. *Jackson*, 88 Okla. 133, 211 Pac. 508; *Metropolitan Life Insurance Company* v. *Lillard*, 118 Okla. 196, 248 Pac. 841; *Bankers' Reserve Life Co.* v. *Rice*, 99 Okla. 184, 226 Pac. 324; and is in direct conflict with and in disregard of applicable decisions of the Federal Courts in *Manufacturers' Accident Indemnity Co.* v. *Dorgan* (C. C. A. 6) 58 Fed. 945, 956; *B. & H. Passmore Metal & Roofing Co.* v. *New Amsterdam Casualty Co.* (C. C. A. 10—opinion by Judge Phillips), 147 Fed. (2d) 536.

(4) The opinion and decision of the Circuit Court of Appeals, as respects the burden placed on the insurance company to show that the damage and loss came within the exemption clause against coverage, is in direct conflict with the applicable Oklahoma law as announced by the Supreme Court of Oklahoma in *General Accident, Fire & Life Assurance Corp.* v. *Hymes*, 77 Okla. 20, 185 Pac. 1085;

Great Southern Life Ins. Co. v. *Churchwell,* 91 Okla. 157, 216 Pac. 676.

(5) The opinion and decision of the Circuit Court of Appeals is therefore in direct conflict with and in disregard of the applicable decisions and principles of law as announced by the Supreme Court of Oklahoma; as announced and followed by other circuit courts and by this Court; and as enunciated and approved by numerous decisions from the appellate courts of other states. Thus the lower court has so far departed from the accepted and usual course of proceedings as to call for an exercise of this Court's power of supervision.

(6) The Circuit Court of Appeals has rendered an erroneous opinion and decision on a question of general public importance, and one of far reaching import and effect,—especially as respects the insurance field of law,—upon which this Court should write an opinion and decision correctly determining the issues involved and the rights of the parties, in accordance with applicable principles of law, as indicated by the decisions heretofore referred to.

WHEREFORE, petitioners jointly and severally respectfully pray that a Writ of Certiorari issue out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Tenth Circuit commanding and directing that Court to certify and send to this Court for its review and determination, a full and complete transcript of the record below, and all proceedings had therein, and that the opinion and decision of said Circuit

Court of Appeals be reversed and that the Judgment of the district court be reinstated, and that petitioners be restored to all their rights thereunder, and that petitioners have such other and further relief as may be just and to which they may be entitled in the premises.

Respectfully submitted,

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Of Counsel.

CERTIFICATE

I, counsel for petitioners, hereby certify that I have examined the foregoing petition and that in my opinion it is well founded and entitled to the favorable consideration of this Court, and that it is not filed for the purpose of delay.

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Dated: Oklahoma City, Oklahoma,
January 15, 1946.